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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 409

AMERICAN SNUFF COMPANY, AND MARTIN J. CONDON, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SNUFF COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, American Snuff Company and Martin J. Condon, individually and as president of American Snuff Company, consider themselves greatly aggrieved by the action of the United States Circuit Court of Appeals for the Sixth Circuit in affirming an Order Requiring Obedience To Subpoena entered in behalf of the Respondent herein by the United States District Court for the Western District of Tennessee.

No opinion determining the issues of the cause was rendered by the Circuit Court of Appeals.

Within the time provided by law and the rules of Court, the Petitioners file this, their Petition for a Writ of Certiorari, praying that the Writ issue to the United States Court of Appeals for the Sixth Circuit to bring this cause and the record therein to this honorable Court to the end that this honorable Court may review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit.

The Questions Presented

This cause presents the general questions—whether the Labor Management Relations Act, 1947, enacted by Congress, amended or altered provisions of the National Labor Relations Act, 1935, (1) so as to require a "charge" upon which a "complaint" is issued to so state an alleged unfair labor practice as to apprise the person against whom the charge is made of the unfair labor practice with which he is charged and, accordingly, require a "complaint" issued by the Board to be based upon a "charge" served upon the person against whom the charge is made; (2) so as to preclude the National Labor Relations Board from convicting a chargee of alleged unfair labor practices unless the alleged practices occurred within six months prior to the filing of the "charge"; and (3) whether the Act, as amended, requires a person, in response to a subpoena *duces tecum*, to bring into a hearing before the National Labor Relations Board, and make available to the Board, documents and data which can have no bearing upon the true legal issue involved in a complaint issued by the Board.

If either questions one (1) or two (2) requires an affirmative answer, or if question 3 requires a negative answer, the judgment of the Circuit Court of Appeals is erroneous. The National Labor Relations Board is proceeding in this

cause as though the Labor Management Relations Act, 1947, made no changes in the pre-existing National Labor Relations Act in the respects above set forth, and the Circuit Court of Appeals has sustained the Board.

That part of Section 10 (b) of the Labor Management Relations Act, 1947, at issue in this cause is set forth below. The emphasized portion of the quotation evidences the addition in language added by the Labor Management Relations Act, 1947, to the pre-existing language of the National Labor Relations Act, 1935.

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge . . .*"
>
> 29 U. S. C. A. Sec. 160 (b)

If the general questions one (1) and two (2) may be answered in the affirmative:

May the National Labor Relations Board sua sponte (without a "charge" setting forth the unfair labor practices involved) issue a Complaint and then issue, based on this void complaint, a subpoena duces tecum and by ancillary proceedings enforce this subpoena?

May the National Labor Relations Board issue a subpoena duces tecum in aid of and for the purpose of conviction of alleged unfair labor practices upon which the Board is barred from issuing a complaint by the six months provision of Section 10 (b) of the Act and by ancillary proceedings enforce this subpoena?

May the Court ignore the illegality of the primary proceeding in the ancillary proceeding and order the production of information, confidential in nature, on the sole ground that the proceeding is ancillary and the Court is without power to question the legality of the primary proceeding?

Any such conclusion compels Petitioners to comply with an order in aid of an illegal purpose without remedy or redress pending hearing and decision in the primary case.

To hold so vests the National Labor Relations Board with powers not conferred by the Act but usurped with judicial sanction, for the exercise of the authority of the Court to compel obedience to subpoenas issued by the National Labor Relations Board is not discretionary in that an illegally subpoenaed party is without *right* to invoke the protection of the judicial functions of the Court.

By the provisions of Section 11 (2) of the Labor Management Relations Act, 1947, the Court whose aid is sought may require the production of evidence *only* "touching the matter under investigation or in question". It is this exercise of judicial protection which Petitioners seek in this Court, and which they consider they were denied in the Court below.

It can hardly be seriously argued that evidence in aid of an alleged unfair labor practice which the National Labor Relations Board does not have jurisdiction to hear or determine could relate to or touch any matter properly in question before the Board.

Petitioners emphasize that the books, records, etc., described in the subpoenas are not sought for the purpose of casting light upon conduct alleged to constitute unfair labor practices, conviction on which is within the jurisdiction of the Board, but as shown by the record and *as admitted* in the record by counsel for Respondent, the books, records, etc., are sought for the purpose of conviction of alleged unfair labor practices supposedly committed over a period of almost two years. The conviction of American Snuff Company is sought for alleged unfair labor practices not set forth in the charge and not committed, if at all, within six months prior to the filing of the charge.

The Petitioners have no objection to producing the books, records, etc. sought for the purpose of casting light on any of their actions properly in issue, before the National Labor Relations Board, provided their use is so restricted.

If general question number 3 may be answered in the negative: May the National Labor Relations Board disregard the basic principles announced by this Court in *National Labor Relations Board* vs. *Mackay Radio Co.* 304 U. S. 333, 58 S. Ct. 904, and the basic principles of the Labor Management Relations Act as set out in Section 9(c) (3) thereof, as follows: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Where all striking employees had been replaced by permanent replacements at the time the striking employees made a mass application for reinstatement, may the Board require the production of employment records following such mass application, and impose upon the employer a duty to seek out and offer employment to a replaced employee when and as such permanent replacement may vacate his job for any reason.

Statement of the Case

On September 6, 1950, United Steelworkers of America, CIO, filed a charge against American Snuff Company—the only charge ever filed—the relevant and pertinent parts of which are:

> "*The above named employer has engaged in and is engaging in unfair labor practices within the meaning of Section (a), Subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.*"
>
> "2. *Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)*":
>
> "Since on or about October 1, 1949, it, by its officers, agents and representatives, has interfered with, restrained and coerced, and is interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, which rights are guaranteed in Section 7 of the National Labor Relations Act.
>
> "On or about January 1, 1950, and on all times since that date, it, by its officers, agents and representatives refused to bargain collectively with United Steelworkers of America, CIO, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.
>
> "By the acts set forth in the paragraphs above, and by other acts and conduct, it, by its officers, agents and representatives, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act."
>
> (Appellant's Exhibit No. 2—Exhibits, p. 19)
> (Tr., p. 68A)

(The emphasized portion above is part of the printed Charge form, the unemphasized portion being typewritten matter filled in by the charging partiy.'

The Charge filed against American Snuff Company sets forth no facts constituting any alleged discrimination in regard to hire or rehire.

The Charge, as its "Basis", only states generally alleged facts constituting unfair labor practices within the meaning of Section 8 (a) (1) (29 U. S. C. A. Sec. 158 (a) (1)), to-wit: "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" and within the meaning of Section 8 (a) (5) (29 U. S. C. A. Sec. 158 (a) (5)), to-wit—"It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)".

(Appellant's Exhibit No. 2—Exhibits, p. 19)
(Tr., p. 68A)

The American Snuff Company was not apprised by the Charge that it was accused of any act by which it encouraged or discouraged membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment" (Section 8 (a) (3)).

(Appellant's Exhibit No. 2—Exhibits, p. 19)
(Tr., p. 68A)

Requesting advice of that with which it was charged, and in reply to a letter from National Labor Relations Board dated November 17, 1950, requesting a "chronological history of collective bargaining" and other information "In

conjunction with the above", American Snuff Company on December 8, 1950, wrote National Labor Relations Board:

> ". . . We have been informed and have understood that where unfair labor practice charges are preferred, we are entitled to be advised definitely as to the times, places and circumstances upon which the charges are based. This is the conclusion we formed from conversation at the meeting of Company representatives with you at your office on October 27, 1950. Whenever the Union or the Labor Board informs us definitely, in accordance with our understanding of the practice, as to the times, places and circumstances of the charges preferred, we shall be glad to furnish you in detail from our records the true and complete facts as to the matters involved . . ."
>
> (Appellants' Exhibit 4—Exhibits, p. 21)
>
> (Tr., pp. 80, 85)

In substantiation of the fact that no "charge" alleging discrimination in hire or rehire had been filed against American Snuff Company, and the Board well knew and recognized this to be true, the National Labor Relations Board in a letter dated March 2, 1951, wrote American Snuff Company, as follows:

> *"The basic nature of the unfair labor charge by the Union is that though you participated in negotiations, you did so without any intention of consummating a labor agreement.* The only way we can determine administratively whether you participated in the negotiations with a good faith intention to arrive at an agreement is by examining in detail all of the facts pertaining to the conferences. The Union has submitted their version. I again must request that you submit your version of these conferences.
>
> "We are all anxious to complete the investigation of this case, but it will be impeded if you do not furnish this information."
>
> (Appellants' Exhibit No. 6—Exhibits, p. 23)
>
> (Tr., p. 86)

On January 16, 1952, the National Labor Relations Board issued its complaint against American Snuff Company charging that it did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Labor-Management Relations Act, 1947.

(Appellee's Exhibit No. 2—Exhibits, pp. 2-7)
(Tr., p. 69)

The complaint is silent as to the charge of refusal to bargain.

Section 8(a)(1) is that part of the Labor-Management Relations Act, 1947, which provides: "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

(29 U.S.C.A. Sec. 158(a)(1))

Section 8(a)(3) is that part of the Labor-Management Relations Act, 1947, which provides: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: provided" etc.

(29 U.S.C.A. Sec. 158(a)(3))

The Complaint alleges that on or about January 13, 1950, the employees of Respondent, including those listed in Appendix A of the Complaint, ceased work concertedly and went on strike. The Complaint recites that on or about July 17, 1950, the United Steelworkers of America, CIO, terminated the strike and the striking employees, including those listed on Appendix A of the Complaint, made an un-

conditional offer to Respondent to return to work as of July 17, 1950.

(Appellee's Exhibit No. 2—Exhibits, p. 3)
(Tr., p. 69)

The "unconditional offer to Respondent to return to work as of July 17, 1950," allegedly made by the "striking employees, including those listed on Appendix A of this Complaint," is the response of 225 former employees—the strikers whose names are listed in Appendix A of the Complaint —to a telegram received by American Snuff Company on July 17, 1950, from the United Steelworkers of America, CIO, the striking Union, advising that the strike had been called off, the picket line removed and striking employees had been requested

> "to report for work Wednesday morning of this week at regular work time."
>
> (Verified answer of appellants—Tr., p. 16)
> (Appellant's Exhibit No. 1—Exhibits, p. 18)

It is undisputed that the strike which began January 13, 1950, was an economic strike and not an unfair labor practice strike.

(The Complaint—Appellee's Exhibit No. 2—Exhibits, pp. 2-7)
(Tr., p. 69)

It is undisputed that by the work week ending February 21, 1950, all strikers had been permanently replaced and on July 17 and July 19, 1950, there were no employment vacancies in the plant of American Snuff Company. In substantiation of these facts the appellants, in open court, tendered to National Labor Relations Board its books and records to evidence such fact of replacement of strikers and

the fact that there were no employment vacancies on July 17 and July 19, 1950.

(Verified answer of appellants—Tr., p. 8)

The alleged violation of Section 8(a)(3) of the Act is based entirely upon the allegation of the Complaint that American Snuff Company "did fail and refuse and continues to fail and refuse to *rehire* the striking employees, including those listed in Appendix A of the Complaint, to their former or substantially equivalent positions of employment" "for the reason that they had assisted or had become members of the Union" or had participated in, or refused to work during, the strike beginning January 13, 1950, and terminating July 17, 1950.

(Appellee's Exhibit No. 2—Exhibits, pp. 3-5)
(Tr., pp. 69, 70)

In aid of an attempt to convict American Snuff Company of discrimination in "rehire" of an unknown person or persons, at an unknown time or times, and with respect to an unknown job opening or position or job openings or positions, the National Labor Relations Board seeks to have enforced its subpoena seeking to require and direct the production of books, records, correspondence, and documents, as follows:

> "All payrolls, personnel and other records of American Snuff Company showing the names, dates and job classifications of each and every hire, resignation, discharge or other termination or change of employment status of employees or applicants for employment at the American Snuff Company for each and every week commencing with the work week immediately preceding January 13, 1950, to the present date."

The "present date" (date of subpoena) was January 30, 1952.

(Appellee's Exhibits Nos. 4 & 5—Exhibits, pp. 9-10)
(Tr., pp. 77, 78)

The purpose of the subpoenas sought to be enforced in this cause is the attempted conviction of American Snuff Company of suspected, but not alleged, acts of discrimination in regard to "rehire" occurring, if at all, subsequent to the date of the filing of the Charge.

> "Mr. Frazer: Well, if Your Honor please, the Board's position is . . ., well, I think I will state it correctly,—if I don't, call me down, Mr. Carter,—is that though this Charge was filed September 6, 1950, and though they concede that they can't convict the company on anything that occurred before March 6, 1950, that they can convict this company of anything that occurred subsequent to the filing of this Charge and up to the date of this complaint. Am I correct?
> "Mr. Carter: I would say substantially."
> (Tr., p. 47)

American Snuff Company and Martin J. Condon, individually and as President of American Snuff Company, to whom the subpoenas duces tecum are directed, have not produced the books, records, correspondence and documents described in the subpoenas duces tecum, they being advised that they do not relate to or touch any matter properly in question under the Complaint issued by the National Labor Relations Board or in the National Labor Relations Board proceedings to which the Application filed herein is ancillary.

(Appellee's Application To Enforce Subpoena—Tr., pp. 1-4)

On March 3, 1952, National Labor Relations Board filed its "Application for Order Requiring Obedience to Sub-

poena Duces Tecum." The respondents to the application, Petitioners herein, duly filed their verified answer, and following oral testimony heard in open court, and argument of counsel, the District Court entered its order requiring appellants to obey the subpoenas duces tecum issued against them.

(Tr., p. 26)

On May 27, 1952, the cause was argued orally before the United States Court of Appeals for the Sixth Circuit, at the conclusion of which argument, Petitioners, leave of Court being first had, filed their reply brief consisting of seventeen (17) pages.

On May 29, 1952, Petitioners received, in an envelope postmarked May 27, 1952, at 5:30 P. M., the opinion and judgment of the Court on their briefs and arguments, said opinion and judgment being as follows:

> "This case came on to be heard upon the record and briefs and oral argument of counsel.
>
> "On consideration whereof, it is ordered that the order of the district court requiring obedience to subpoena be and hereby is affirmed. *Consumers Power Company v. N.L.R.B.*, 113 F. 2d 38 (C.A. 6), *Goodyear Tire & Rubber Company, et al. v. N.L.R.B.*, 122 F. 2d 450 (C.A. 6), *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186, 209, 214."
>
> (Tr., p. 62)

The Petitioners filed their Petition for Rehearing on June 12, 1952, which was denied, again without opinion, on September 5, 1952.

If the Appellants are entitled to the relief which they seek, or any of it, and that relief is granted, the issues of the cause before the National Labor Relations Board will be materially and properly narrowed, and instead of try-

ing two hundred twenty-five or more separate causes interspersed over a period of more than two years the burden of the Petitioners and subsequently the burden of the Court in any review before it of any decision of the National Labor Relations Board will be limited to a record of those matters only which the Board is authorized to consider and upon which it may legally reach a decision.

Basis of Jurisdiction

The Circuit Court of Appeals for the Sixth Circuit has failed and refused to decide important questions of Federal Law which have not been, but should be, settled by this Honorable Court.

The Circuit Court of Appeals for the Sixth Circuit, in affirming, without opinion, the District Court, has rendered decisions on important questions of Federal law which, though not directly decided by other United States Circuit Courts of Appeals, are in conflict with the indicated decisions of other Circuit Courts of Appeals on the same questions.

The Circuit Court of Appeals for the Sixth Circuit, in affirming, without opinion, the District Court, has assessed Petitioner, American Snuff Company, if Petitioners be sound in their assignment of error, with great, but unnecessary and needless, expense by requiring American Snuff Company to defend numerous instances (the Complaint alleges 225 in number) of alleged discrimination in "rehire" (no discrimination in reinstatement or any other type of discrimination is alleged in the Complaint issued), each of which instance of alleged discrimination in "rehire", if proven, is a separate and distinct unfair labor practice, and, unless relief is granted, each of which must be tried, even though barred as a matter of law, upon the

individual varying facts and circumstances incident to each separate instance of alleged discrimination in "rehire".

N. L. R. B. v. *Mackay Company*, 304 U. S. 333;
Sax v. *N. L. R. B.* (C.C.A. 7 1948), 171 F. (2) 769;
N. L. R. B. v. *Childs Company* (C.C.A. 2 April 4, 1952), 195 F. (2) 617.

No attempt was or is made in this cause to have any Court determine any issue of fact whatever. The issues depend entirely upon whether *as a matter of law* the records sought to be subpoenaed relate to or touch the issues properly before the National Labor Relations Board. The questions raised affect vitally the relations between the public and the National Labor Relations Board.

The issues raised by Petitioners question the power, authority and jurisdiction of the Board in the matter in issue to entertain and determine any unfair labor practice stated in its Complaint alleging discrimination in regard to "rehire" within the meaning of Section 8 (a) (3) of the Act and question the power, authority, and jurisdiction of the Board to entertain and determine any alleged unfair labor practice occurring at any time other than within six months prior to the filing of the Charge against American Snuff Company.

The issues of this cause arise as the result of the National Labor Relations Board choosing to disregard, as is believed, the restrictive and clarifying language added by Congress in Section 10 (b) of the Labor Management Relations Act, 1947, by which Congress expressed its dissatisfaction with the original corresponding provision appearing in the National Labor Relations Act, 1935, or more probably its administration. These Respondents invoke the protection accorded them by Congress by the amendments in Section 10 (b) of the Labor Management Act, 1947.

In view of the effort of Congress to clarify the law, the uncertainty, however, yet existing in regard to it, and the confusion prevalent with respect to rights under the Labor Management Relations Act, 1947, and the expense incident to individuals seeking to define their rights, it is considered of great importance that those who do or may stand before the National Labor Relations Board, and particularly those without funds to litigate their rights, privileges and immunities as citizens of the United States, be apprised of that which they may expect under the amended and existing law. Two, at least, of those important and fundamental issues are involved in this cause.

Important to the Public as are the principles involved in this cause, the Circuit Court of Appeals for the Sixth Circuit has not decided the principles of law in issue, but has failed and refused to determine them. That Court in its judgment, entered on the day of argument and on the day these respondents filed their Reply Brief, cites in support of its judgment three cases, they being:

> "*Consumers Power Company* v. *N.L.R.B.*, 113 F. 2d 38 (C.A. 6);
> *Goodyear Tire & Rubber Company et al.* v. *N.L.R.B.*, 122 F. 2d, 450 (C.A. 6);
> *Oklahoma Press Publishing Company* v. *Walling*, 327 U. S. 186, 209, 214".

The Consumers Power Case does purport to discuss the requirements of a "charge", but could not be authority on the question of the sufficiency of a "charge" under the amended and changed provisions in that respect of the Labor Management Relations Act, 1947, the case having been decided in the year 1940.

The Goodyear and Oklahoma Press Publishing Company Cases hold, in the opinion of counsel, that the National

Labor Relations Board preliminarily and initially should determine *issues of fact*, including jurisdictional questions dependent upon *issues of fact*, the provisions for judicial review of the findings and orders of the Board, being adequate to fully protect any and all rights of Petitioners. There was no *issue of fact* to be determined in this cause insofar as any principle herein raised is concerned.

With those cases, Petitioners have no quarrel.

The Circuit Court of Appeals has ignored in this ancillary proceeding the illegality of the primary proceeding in aid of which the subpoenas are sought to be enforced, and, as a result, would compel Petitioners to comply with an order in aid of an illegal purpose.

The Circuit Court of Appeals has ignored that salutary and controlling principle of law succinctly stated by this Court in the case of *National Labor Relations Board* against *Highland Park Manufacturing Co.*, (1951) 341 U. S. 322 in this language:

> *"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain instances, its final order could hardly be valid.*
>
> We think the contention is without merit and that an *issue of law* of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the Courts when they are asked to lend their enforcement powers to an administrative tribunal." (325-6)

The Court has, in the case of *National Labor Relations Board* v. *Mackay Radio Co.*, 304, U. S. 333, 58 S. Ct. 904, determined the right of an employer, not guilty of an unfair labor practice, to continue the operation of his plant through

the medium of permanent replacements when and as his former employees may have struck for purely economic purposes, and has decreed that such employer is under no obligation to remove such replacements when and as the strikers unconditionally return and request reinstatement. The Labor Management Relations Act in Section 9(c)(3) has declared that replaced strikers not entitled to reinstatement are not entitled to vote in Board conducted elections. The legislative history of the Labor Management Relations Act reflects an intent of Congress that the employer-employee relationship terminate where an economic striker is replaced on the job by a permanent replacement.

The foregoing has become basic principle governing the industry of the United States and its relationship to its employees. The Circuit Court of Appeals has ignored the fact that in such circumstances, an employer is under no more obligation to offer employment to fill a vacancy in his plant to a striker who has theretofore been replaced by a permanent replacement, than he is to offer such employment to a stranger—and that the fact that strangers have been employed to fill vacancies caused by termination of employment of those who had been hired as permanent replacements, does not raise an inference and is not *per se* related to or touching upon the issue of a discriminatory refusal by the employer to hire a previously replaced striker because of his affiliation with the Union or his participation in such strike, especially when such displaced striker has never appeared as a job applicant after the first mass application.

The occurrence of economic strikes and the replacement of strikers by permanent replacements is a matter of such common experience in American industry that the public interest will be promoted by the prompt settlement in this Court of the question of whether a replaced striker has a continuing right to demand and receive employment at his

previous job whenever the same might become vacant following its first filling by a permanent replacement, and whether the employer is under a duty to seek him out and offer the job to him before considering actual applicants.

The Judgment of the United States Court of Appeals for the Sixth Circuit, prayed herein to be reviewed, was entered May 27, 1952. A Petition for Rehearing, filed on June 12, 1952, was denied on September 5, 1952.

Assignment of Error

The United States Circuit Court of Appeals for the Sixth Circuit erred in affirming an order and judgment of the United States District Court for the Western District of Tennessee holding that the books, records, correspondence, and documents which Respondent in this cause seeks to require the Petitioners to testify about and bring with them and produce before a Trial Examiner of National Labor Relations Board relate to or touch any matter properly in question under the Complaint issued by National Labor Relations Board or in the National Labor Relations Board proceedings to which the Application For Order Requiring Obedience to Subpoena Duces Tecum filed in this cause is ancillary and must be so produced by Petitioners.

The books, records, etc., in whole or in part, do not relate to or touch any matter properly in question for:

(1) That part of the Complaint issued in the primary proceeding and purporting to allege discrimination in "rehire" within the meaning of Section 8 (a) (3) of Labor Management Relations Act, 1947, is not supported by the Charge upon which the Complaint is based and the books, records, etc., attempted to be subpoenaed in this cause are sought in aid of conviction of discrimination in "rehire" within the meaning of Section 8 (a) (3) of the Act; and

(2) The six months limitation contained in Section 10 (b) of the Labor Management Relations Act, 1947, precludes the National Labor Relations Board from convicting the Petitioner, American Snuff Company, of alleged unfair labor practices unless the alleged practices occurred within six months prior to the filing of the Charge upon which the Complaint is based, to-wit: September 6, 1950, and the books, records, etc., evidencing changes of employment status subsequent to September 6, 1950, attempted to be subpoenaed in this cause are sought in aid of conviction of alleged discrimination in "rehire" subsequent to September 6, 1950.

(3) All the strikers having been permanently replaced on July 17, 1950, and there being no vacancies at the time when applications were made for reinstatement, such employees lose their status as employees and are entitled to no more consideration than strangers when subsequent vacancies are to be filled and that, therefore, the books, records, etc., sought to be subpoenaed can have no bearing upon and do not touch upon and are not relevant to the question of discriminatory refusal to rehire in the absence of an allegation and proof that at the time of application in the first instance, the former jobs of the striking applicants were unfilled.

BRIEF AND ARGUMENT

MAY IT PLEASE THE COURT:

The Petitioners are asking the Court to recognize the limits of the issues of this cause as determined by law. It is conceived to be the duty of the Court under the Labor Management Relations Act, 1947, to measure the limits of the issues and to deny enforcement of the subpoena to the extent that the books, records, etc., sought to be subpoenaed do not fall within those defined issues and would not be pertinent or relate to them.

The issues of this cause depend entirely upon whether as a matter of law the records sought to be subpoenaed relate to or touch any matter properly in question under the Complaint issued by the National Labor Relations Board.

Section 11 (2) of the Labor Management Relations Act, 1947, is quite clear that the Courts, and not the Board, control the determination of what testimony, records, etc., relate to and touch a matter in question.

The authority and duty of the Courts to delineate issues in proceedings to enforce subpoenas, refuse to permit fishing expeditions, and compel a subpoenaed party to produce only testimony pertinent to issues of which the Board has jurisdiction to entertain and determine is well established.

The case of *Myers, et al.* v. *Bethlehem Shipbuilding Corporation* (1938), 303 U. S. 41, is directly in point.

In that case, a National Labor Relations Board matter, the respondent sought an injunction against Myers, an Acting Regional Director of the Board and other Board agents, to enjoin them from holding an unfair labor practice hearing on the ground that the respondent's operations did not affect Interstate Commerce, a fact alleged in the complaint issued by the National Labor Relations Board.

In denying the injunction, the Supreme Court said:

> "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power of the subject matter."
> (50-51)

However, in discussing the subpoena powers of the Board and the right to resist enforcement of a subpoena, the Court further said:

> "The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience, it must apply to a District Court; and to such an application, defense may be made."
> (49)

The opinion in the *Myers* case well illustrates the distinction between those cases wherein the jurisdiction of the Board depends upon the determination of *an issue of fact* and those cases, such as *N.L.R.B.* v. *Highland Park Mfg. Co.* (1951), 341 U. S. 322, and the case at bar, wherein the jurisdiction of the Board which is attacked depends entirely upon *an issue of law.*

The *Myers* case, on the subpoena question, as does *E. I. Dupont DeNemours & Co.* v. *Boland,* (C.C.A. 2), 85 F. (2) 12, on the same question, cites with approval the case of *Federal Trade Commission* v. *Claire Furnace Company,* 274 U. S. 160, a suit to enjoin an order of the Federal Trade Commission requiring a company to produce records which the company considered the Commission had no authority to require.

In disposing of the issues, the Supreme Court said:

> "There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If exercising his discretion, he had instituted either proceeding, the defendant therein would have been fully heard and could have adequately and effectively prescribed every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction." . . .
>
> (173-4)

> "Until the Attorney General acts, the defendants cannot answer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. The right being adequate, they were not in a position to ask relief by an injunction."
>
> (174)

A Complaint Issued Must Be Supported by the Charge Filed

Even before the enactment of the Labor-Management Relations Act, 1947, containing in Section 10(b) the restrictive and clarifying language shown below by emphasis:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agents or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint *provided, that no complaint shall*

issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.''

29 U.S.C.A., Sec. 160(b)

all Courts considering the function of a "charge" under the National Labor Relations Law, 1935, have held that the filing of a "charge" was jurisdictional and the National Labor Relations Board was without power to initiate a "complaint" upon its own motion.

National Licorice Co. v. *N.L.R.B.* (1940), 309 U. S. 350;

N.L.R.B. v. *Hopwood Retinning Company* (C.C.A. 2, 1939), 98 F. (2) 97;

Consumers Power Company v. *N.L.R.B.* (C.C.A. 6, 1940), 113 F. (2) 38.

Congress, in the year 1947, being dissatisfied with the National Labor Relations Act, 1935, or its administration, undertook to amend that pre-existing labor law and enacted the Labor-Management Relations Act, 1947, with the restrictive and clarifying language above shown.

If there was any serious doubt regarding the function which a "charge" must serve that doubt was dispelled by the express addition of the six months provision and the requirement that a copy of the "charge" shall be served upon the person against whom the charge is made.

The "charge," certainly, now must perform the functions of fixing the six months period beyond which "complaints" may not be "based" and apprising the party charged of that unfair labor practice with which he is charged.

The "charge," by the inclusion of a limitation period incident to it, must necessarily now sufficiently identify an alleged unfair labor practice so to stop or interrupt the limitation running on and against the alleged unfair labor practice. The "charge," by the requirement that a copy of it be served upon the person against whom the charge is made, must necessarily be sufficiently definite to apprise a person of that which he is charged. Both of these requirements emphasize that character which a "charge" must possess.

It is Petitioners' contention that the Charge filed against American Snuff Company does not charge discrimination in "rehire," and that, accordingly, the Board is without power to initiate a "complaint" against American Snuff Company alleging discrimination in regard to "rehire" and necessarily the Board lacks jurisdiction, *as a matter of law*, to convict American Snuff Company of discrimination in "rehire."

No case *directly* decides the principle of law here urged that a "charge" upon which a "complaint" is based must so state an alleged unfair labor practice so as to apprise the person against whom the charge is made of the unfair labor practice with which he is charged, and accordingly, require a "complaint" issued by the Board to be based upon a "charge" served upon the person against whom the charge is made.

However, Section 10(b), when stripped down, appears by virtue of its own express language to be basic and compelling authority for this position of Petitioners:

> "Whenever it is *charged* that any person has engaged in . . . *any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint stating the charges* IN THAT RESPECT," etc.
>
> 29 U.S.C.A. Sec. 160(b)

There is only one charge involved in this cause, and there can be no doubt of the language of the charge. There further can be no doubt that the Complaint involved in this cause is based on the charge, the Notice of Hearing (Appellee's Exhibit No. 3—Exhibits, p. 8, Tr. p. 76) reciting:

> "A copy of the Charge upon which the Complaint is based is attached hereto."

A clear-cut issue upon this point of argument is presented.

All Courts dealing with or discussing this question of law have recognized the principle invoked, but the cases have been decided in such manner as to pretermit a *direct* decision on the inevitable question which must be at some time directly decided by the Courts.

It is believed that the confusion occasioned by the Court's failure to directly pass upon this question, resulting in the National Labor Relations Board refusing to attach any substantial importance to the enactment of Congress clarifying the issue and restricting the powers of the Board, may only be cured by a definitive judicial pronouncement.

The Board is continuing to process and prosecute without relation to whether the unfair labor practice is the unfair labor practice contained in the "charge."

The rulings and decisions of the Courts indicate both that a decision on this vital and important question is inevitable and that the issue can only be resolved favorable to the view of Petitioners.

The Supreme Court, in 1940 and prior to the clarifying and restrictive language added by Congress in Section 10(b) of the Labor-Management Relations Act, 1947, found it unnecessary to pass upon the question here presented for reasons set forth below:

> "It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent

proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board" . . . The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the Court below correctly held that 'the Board was within its power in treating the whole sequence as one'."

National Licorice Co. v. *N.L.R.B.*, 309 U. S. 350 (369).

The case of *Ritzwoller Co.* v. *N.L.R.B.* (C.C.A. 7, 1940), 114 F. (2) 432, recognizes the effect of a "complaint" charging a violation of one section of the act and a finding of a violation of another.

In this case the Court said:

"If the complaint had charged a violation of one section of the Act and the finding concerned another, a different question would be presented . . ."
(434-5)

The fact that guilt of an unfair labor practice must be predicated upon that unfair labor practice being stated in the "charge" is definitely held in *Joanna Cotton Mills Co.* v. *N.L.R.B.* (C.C.A. 4, 1949), 176 F. (2) 749.

The facts and reasoning of the Court is:

"The answer of the Board is that the charge served more than six months after the effective date of the act was an amended charge and that the original charge was filed and served in time. The trouble with this is

that the original charge was not one which could have been sustained by proof of discharge on account of Blakely's activities in connection with the petition. It was one relating solely to antiunion activities and the discharge of Blakely on account of union membership and activities in behalf of the union, a charge of which the Board found that the company was not guilty. The amended charge, which was expressly filed as a substitute, alleged for the first time that the discharge was because Blakely had engaged in "concerted activities" other than in connection with his union membership, and thus brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge.

"The Board agrues that it was the discharge of Blakely that was charged as an unfair labor practice in both charges; but the mere discharge of an employee is not an unfair labor practice. To discharge him because of union membership or activity is, of course, an unfair labor practice; to discharge him because of originating and presenting a petition for the discharge of a foreman, if an unfair labor practice, is one of an entirely different character. The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.' *United States v. Andrews*, 302 U. S. 517, 524; *United States v. Garbutt Oil Co.*, 302 U. S. 528. Not until more than six months after the effective date of the Labor-Management Relations Act was any charge served upon the company upon which the finding of guilt made by the Board could have been based; and it was then too late for the charge to be made." (754)

One case, that of *N.L.R.B.* v. *Globe Wireless, Ltd.* (C.C.A. 9 December 27, 1951), 193 F. (2) 748, holds that where a

"charge" does not include an unfair labor practice which is included in a "complaint", the "complaint" may be considered an enlargement of the "charge" filed and cover those unfair labor practices newly incorporated to the extent that such unfair labor practices may have occurred within six months preceding the issuance and service of the "complaint".

The Court's holding is:

> "The charge filed with the Board alleged violations of Section 8 (a) (1) and (3) only by the making of the discharges. There was no averment of the independent coercive violations just now discussed, the latter being later incorporated in the Board's complaint. The respondent claims that a complaint issued under the Act as amended is limited in scope by the averments contained in the charge filed to initiate the proceeding. We see no basis for this view. The Board would not appear to be debarred by the amended Act from enlarging upon a charge unless the additional unfair labor practices alleged were committed more than six months prior to the enlargement. The inclusion here of the charge of coercion was made within six months of the allegedly coercive conduct." (752)

Under the theory of the Globe Wireless Case the books and records relating to or touching the alleged unfair labor practice of discrimination in regard to "rehire" within the meaning of Section 8 (a) (3) would be limited to those showing "names, dates, and job classifications of each and every hire, resignation, discharge or other termination or change of employment status of employees or applicants for employment at American Snuff Company for each and every work week" for a period of six months prior to the issuance and service of the Complaint upon American Snuff Company.

We do not consider that the *Globe Wireless* case expresses sound law in view of the fact that a "charge" must initiate

a "complaint", and the period of limitation of six months is tied to the "charge" and not to the "complaint".

Can the Charge involved in this cause, under any settled principles of jurisprudence, support the Complaint alleging discrimination in "rehire"?

It is true that the Charge states:

> "The above-named employer has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act."
>
> (Appellants Exhibit No. 2—Exhibits, p. 68A)

However the inclusion of the numerals and letter, 8 (a) (3), without more, is meaningless.

The numerals and letter, 8 (a) (3), were probably inserted in support of that discrimination in regard to "tenure of employment" which would have resulted from failure to "reinstate" the strikers had the *facts* constituting refusal to bargain collectively (8) (a) (5), set forth in the Charge, been well founded. The Complaint alleges no violation of Section 8 (a) (5) because of inability to even prima-facia establish the unfair labor practice set forth in the Charge—"to refuse to bargain collectively".

The inclusion of the numerals and letter, 8 (a) (3), certainly does not state or charge against American Snuff Company discrimination in regard to "rehire". Any unfair labor practice charge must, of necessity, be so capable of identification as to interrupt or stop the running of the six months period of limitation and apprise the charged party of the offense lodged against him, both essentials being now required since the enactment of the Labor Management Relations Act, 1947.

In the law applicable to Statutes of Limitations, it is fundamental:

> "So, also, the commencement of a suit does not interrupt the running of the statute as to causes of action not set forth in the complaint or petition."
> 34 Am. Jur. p. 203, Sec. 247.

Also:

> "It is equally well settled, however, that a pleading, although denominated 'supplemental' does not relate back to the time of the filing of the original complaint, petition, or similar pleading if a new cause of action is set forth. In other words, a new cause of action stated in supplemental bill is not relieved of the operation of the statute of limitations by the fact that the original bill was brought within the period prescribed."
> 34 Am. Jur. p. 221, Sec. 269.

Sections 8 (a)(1) through Section 8 (a) (5) of the Act set forth the unfair labor practices of which an employer may be guilty.

It will be noted that some of the individual sections comprise more than one unfair labor practice which may be charged against an employer, while Section 8 (a) (5) comprises merely one unfair labor practice which might be urged under it.

Section 8 (a) (3), as follows:

> "It shall be an unfair labor practice for an employer —by discrimination in regard to (1) hire or (2) tenure of employment or any term or condition of employment to (3) encourage or (4) discourage membership in any labor organization: provided", etc.
> 29 U.S.C.A. Sec. 158 (a) (3).

comprises at least four stated unfair labor practices as shown above—probably more.

In the case before the Court neither the Company nor the Board were able to recognize from the Charge that it alleged discrimination in regard to "rehire" within the meaning of Section 8 (a) (3). The company in its letter to the Board of December 8, 1950, asks advice of the times, places, and circumstances upon which the charge against it is based.

On March 2, 1951, the Board wrote the Company:

> "The following information is requested:
>
> 1. A list of all your striking employees who on or about July 16 applied for *reinstatement.*"
>
> (Appellants' Exhibit No. 6—Exhibits, p. 23. Tr. p. 86)

Attention is invited to the fact that "reinstatement" is a consequence of a violation of Section 8 (a) (5), but is not a consequence of discrimination in regard to "rehire" under Section 8 (a) (3). "Rehire" is necessarily a new hiring of a former employee. It is submitted that the Board advisedly employed the language which it used.

> "Restoration of the strikers to their employment, by order of the Board, under Section 10 (c) of the Act, could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5, and before respondent had resumed normal operations of its factory.
>
> *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292 (296)

In the same letter of March 2, 1951, the Board advised:

> "*The basic nature of the unfair labor charge by the Union is that though you participated in negotiations, you did so without any intention of consummating a labor agreement.*"

In stating its grievances in its Charge of September 6, 1950, and the only Charge filed, the Union did not recognize

any right had by the strikers to "rehire". The Union did not claim or allege any act of discrimination resulting from failure to "rehire" any of the strikers.

Yet the subpoenas duces tecum sought to be judicially enforced in this proceeding are solely in aid of that part of the Complaint alleging discrimination in regard to "rehire", one of the several unfair labor practices which might be charged under Section 8 (a) (3), but which unfair labor practice is not included in the Charge upon which the Board rests its jurisdiction to issue the Complaint. It is truly an anomalous situation.

It would be interesting to speculate upon that which the American Snuff Company would have done in the one year, four months, and ten days elapsing between the date of the Charge—September 6, 1950,—and the issuance of the the Complaint—January 16, 1952—had it known that discrimination in regard to "rehire" had been or would be charged against it.

The company was denied any opportunity incident to knowledge—and as we conceive the Act, the purpose of the requirement of service of the Charge upon the party charged is that the party charged shall have knowledge of that which is charged. As shown, *the board* did not understand from the Charge that discrimination in regard to "rehire" was included within the Charge.

The Charge filed in this cause does not advise American Snuff Company of any act or acts of discrimination in regard to "rehire", generally or specifically, committed by it. In fact it charges no act or acts of discrimination in regard to "rehire" within the meaning of the Act.

If it be argued or considered that the Charge not stating discrimination in "rehire" may initiate the Complaint alleging discrimination in "rehire" as an unfair labor practice and since "no complaint shall issue based upon any unfair labor practice occurring more than six months prior

to the filing of the charge with the Board" etc., it must follow that the six months limitation has no meaning whatever.

If Section 8 (a) (3) contains four or more separate unfair labor practices, may the statement in a "charge" of one of those unfair labor practices toll the period of limitation upon another? May no statement of any of the unfair labor practices contained in Section 8 (a) (3) toll the limitation upon all of them?

If—

> "It is of the essence of statutes of limitations that time begins to run only after the right to prosecute then to a conclusion has fully occurred. As soon, however, as the cause of action has occurred, the Statute of Limitations begins to run thereon."
>
> 34 Am. Jur., p. 91-2, Sec. 113.

and the period of limitation is tolled, as in these cases, only by the filing of a "charge", it must follow that the charge must be more than a piece of paper. It must contain a statement of the unfair labor practice tolled, otherwise the six months provision is written out of the Act.

Two recent cases decided by the Circuit Court of Appeals for the Second and Third Circuits are clear, concise and definite that an alleged unfair labor practice must be stated with sufficient clarity to identify it, if it is to be saved from the operation of the limitation contained in the Act.

Those cases are *N. L. R. B.* v. *Pennwoven Company* (CCA 3, January 11, 1952), 194 F. (2) 521, and *N. L. R. B.* v. *Childs Company* (CCA 2, April 4, 1952), 195 F. (2) 617.

In the *Childs* case one, Potter, was discharged on January 23, 1948, pursuant to the terms of an illegal closed shop agreement. In September, 1948, and at a time when his claim of illegal discharge was barred by the six months limitation, Potter filed a charge against the company, and demanded reinstatement to his former position.

The decision of the Board and the Court, the Court's recognition of the independent nature of unfair labor practices demanding "reinstatement" and "rehire", and the effect of the Limitation is set forth in the following excerpts from the opinion of Judge Augustus Hand:

> "It conclusively shows that he was at all times seeking reinstatement to his former rights and not merely new employment. As we have already said, restoration to these rights was barred by failure to file his charge in time and therefore the Company was not required to accede to his demand. So the Third Circuit held in *N. L. R. B. v. Pennwoven, Inc.*, 194 F. 2d 521, where the same issues as here seem to have been presented."
>
> ". . . The statute only prevents discrimination in regard to hire where the discrimination encourages or discourages membership in labor organizations. 29 U. S. C. A., Section 158(a)(3). It is not apparent to us how the Company was bound under the statute to give Potter a right that he never asked for and how failing to give him such a right constituted discrimination forbidden by the Act."
>
> (621).

And in a concurring opinion, Judge Learned Hand said:

> "The question is as to the meaning of the words 'any unfair labor practice occurring more than six months prior to the ruling of the charge', and, as I understand the opinion, this limitation ran against Potter only because he demanded reinstatement in, and restoration to, his original position with back pay and seniority. Had he merely asked for new employment dating from the time of his demand, it would have been an independent 'unfair labor practice' to refuse him, although the refusal were for the original reason: i.e., that the union unlawfully demanded it."
>
> (621).

The Court in the *Pennwoven* case holds that the Labor Management Relations Act, 1947, fixes a six months period

of limitation which will be honored by the Courts and that in the application of it a statement of one unfair labor practice will not support a conviction on another barred by the limitation.

The holding of the Court that a claim under one alleged unfair labor practice will not support a conviction upon an unalleged unfair practice is exemplified by the following language of the Court:

> "This brings us to the novel and difficult question in the case. It concerns three employees against whom discrimination because of union activity is charged. The Board has made a reinstatement order with the usual back pay allowance. And the respondent in answering the petition for enforcement makes this portion of the Board's order his chief point of opposition."
> (523)

> "Even if we take the theory that a new claim under the statute may arise upon proof of acts of discrimination following the original refusal to rehire, the failure to act upon receipt of this letter is not such an act. We find it impossible to understand this letter as anything but a demand for reinstatement to a former position with all the benefits that such reinstatement could bring. The Board calls the letter "an unconditional application for employment." If that is a fact-finding we cannot accept it. If it is comment or argument we are likewise compelled to disagree. There is nothing we can say to support our position which is any stronger an argument for it than the text of the letter itself."
> (526).

It is considered that no charge has been made against or served upon American Snuff Company that it has or is discriminating in regard to "rehire". The filing of a charge is a jurisdictional prerequisite to the issuance of a complaint.

It is submitted that no "complaint" legally alleging discrimination in regard to "rehire" within the meaning of Section 8(a)(3) of the Act has been issued against American Snuff Company and no books, documents, papers, etc., may relate or touch an alleged unfair labor charge not properly, and only illegally, included in a "complaint" issued.

Any Conviction Is Limited by the Six Months Statute

The books, records, etc., sought to be subpoenaed in this cause encompass a period of time far in excess of the statutory period of six months which fixes the jurisdiction of the Board to entertain and determine alleged unfair labor practices.

That part of Section 10(b) fixing the six months limitation is:

> "No Complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and a service of a copy thereof upon the person against whom such charge is made." etc.
>
> 29 U. S. C. A. Sec. 160(b).

The Charge in this case was filed September 6, 1950. The Board seeks to have the Petitioners produce records from the work week immediately preceding January 13, 1950, to January 30, 1952.

A relatively simple question is presented of whether the limitation period is six months or some longer period.

There is no question but that the purpose of the subpoenas issued in this cause is the conviction of American Snuff Company of alleged unfair labor practices *within and without* six months prior to the filing and service of the Charge in this case.

Such is admitted:

> "Mr. Frazer: Well, if your Honor please, the Board's position is . . ., well, I think I will state it correctly,—if I don't, call me down, Mr. Carter,—is that though this Charge was filed September 6, 1950, and though they concede that they can't convict the company on anything that occurred before March 6, 1950, that they can convict this company of anything that occurred subsequent to the filing of this Charge and up to the date of this complaint. Am I correct?"
> "Mr. Carter: I would say substantially."
> (Tr. p. 47).

The practical effect of such contention is to wipe out the six months statute enacted by Congress. This contention would unlimit that which Congress has expressly limited, and would frustrate the will of Congress expressed after bitter debate, the veto of the President, further consideration by Congress, and the enactment, over the veto of the President, of the Labor Management Relations Act, 1947.

In connection with this phase of Petitioners' argument it is considered important that consideration be given the fact that Section 10 (b) of the Labor Management Relations Act, 1947, does not create a statute of limitations and the six months period fixed is not one of repose or of remedy. Section 10 (b) on the contrary is a statute of creation and the period fixed in the Act defines, establishes and delineates the sole authority and jurisdiction of the Board to consider alleged unfair labor practices.

> "A Statute of Limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation and the commencement of the action within the time it fixes is an indispensable condi-

tion of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

34 Am. Jur. p. 16-17, Sec. 7.

It is respectfully submitted that under the theory of the Board the Charge might have been filed on July 17, 1950, and would have tolled the limitation forever.

Under this fantastic theory, the Charge may be filed at a time when no unfair labor practice had been committed and the charging party protected against the limitation forever with respect to any unfair labor practice which might be subsequently committed.

The effect of the position of the Board, and the Board has here applied to the Courts to enforce and sustain that position, is to suspend the running of the limitation as to unfair labor practices which have not accrued or matured and which did not exist when the Charge was filed. This position of the Board materially writes out of the Labor Management Relations Act, 1947, the limitation enacted in it by Congress.

No Court considering the period of limitation fixed in Section 10 (b) of the Act has treated it other than as a *period of six months* prior to the filing of the "charge" within which an alleged unfair labor practice must occur if to be entertained by the Board.

In discussing the period of limitation fixed in Section 10 (b) of the Act, the Circuit Court of Appeals for the Fifth

Circuit in the case of *American Federation of Grain Millers, AFL* v. *N.L.R.B.,* (June 12, 1952), 197 F. (2) 451, commented:

> "In complete disagreement with petitioner's claim that the dismissed charges were based on unfair labor practices *occurring within six months prior to the filing of the charge* with the Board and service of a copy thereof, the Board, insisting that this is not so, supports its view with a statement of the facts of record and of the reasons for the conclusion that the proviso requires the dismissal of the charge."
> (453)

The Circuit Court of Appeals for the Third Circuit in the case of *N.L.R.B.* v. *Pennwoven Company,* (Jan. 11, 1952), 194 F. (2) 521, on the same subject says:

> "The question is not one which is settled by authority and we must face it de novo. We bear in mind that Congress inserted this limitation provision because there had been complaint that people were being brought to book upon stale charges. The rather *brief limitation period* was an effort to shorten up the time in which respondents could be called upon to answer charges of unfair labor practices. *The legislative history* and contemporaneous discussion shows this, we think."
> (524)

Also:

> "The Board would not appear to be debarred by the amended act from enlarging upon a Charge unless the additional unfair labor practices alleged were committed *more than six months prior to the enlargement.*"
> *N.L.R.B.* v. *Globe Wireless, Ltd.* (C.C.A. 9, 1951), 193 F. (2) 748 (752).

The legislative history of the enactment of the six months period of limitation makes clear the intent and purpose of

Congress. That legislative history plainly evidences that unfair labor practices for which a party may be convicted or held liable are those limited to "practices (having) occurred within six months prior to the filing of the charge."

The Congressional history evidenced by the House majority report, the House minority report, the Senate majority report, the Senate minority report, and the Conference report, upon which the Act was finally passed, reflect and evidence a unanimity of opinion by those in Congress both favoring and opposing the passage of the Act, that the limitation in Section 10 (b) is a "six-month period of limitations upon the filing of the charges".

The Congressional history is as follows:

> "Changes in procedural provisions of section 10 (b) are clear.
>
> "*A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred,* and that requires the administrator to issue the Complaint within six months after the charge is filed. It has not been unusual for the Board, in the past, to issue its Complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused. *Allowing six months for filing a charge* and another six months for the Administrator to act upon it does not seem unreasonable."
>
> (House Report No. 245 on H. R. 3020) (Vol. I, Page 331, Legislative History of Labor Management Relations Act, 1947).

> "Section 10 (b) prescribes generally the procedure to be followed upon the filing of an unfair labor practice charge. It would amend Section 10 (b) of the National Labor Relations Act to prevent the Administrator from issuing any complaint on a charge of unfair labor practices *unless the practices occurred within six months*

prior to the filing of the charge. The Administrator is prohibited from issuing a complaint based upon a charge filed more than six months prior to the issuance of the Complaint.

"1. Limitations on Filing Charges

"The effect of these provisions would be particularly harmful in cases where employers establish company unions or engage in surveillance, espionage, and similar misconduct. Activities such as these are usually carefully concealed and are not generally revealed until an outside union attempts to organize the plant. Under the National Labor Relations Act and the rules of the National Labor Relations Board employers are given adequate protection against untimely charges for the National Labor Relations Board will not proceed upon them unless good cause appears for the delay. Moreover, even in those cases in which the Board does proceed, it does not usually require the employer to pay back wages for the period of the delay to employees discharged discriminatorily. There is therefore no necessity for the proposed amendment.

"Furthermore, the provisions would merely encourage employer unfair labor practices of a kind which cannot readily be detected. *By establishing within the passage of the short space of six months, an absolute immunity against such malpractices,* the bill would deprive employees in such cases of the benefits of genuine collective bargaining and encourage resort to strikes and other means of self-help."

(House Minority Report No. 245 on H. R. 3020)
(Vol. I, Page 381, Legislative History of Labor Management Relations Act, 1947.)

"Section 10 (b): The principal substantive change in this section is a provision *for a six-month period of limitations upon the filing of charges.* The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, and a rider to the current appropriations bill (which if this amendment

was adopted would no longer be necessary) contains a three-month period of limitations with respect to certain kinds of unfair labor practices."

(Senate Report No. 105 on S. 1126) (Vol. I, Page 432, Legislative History Labor Management Relations Act, 1947.)

"5. *It requires that charges of unfair labor practices be filed within six months after their commission—the shortest statute of limitations known to the law* thereby offering a premium to those employers who conceal commission of unfair labor practices."

(Senate Minority Report No. 105, Pt. 2, on S. 1126) (Vol. I, page 467, Legislative History of Labor Management Relations Act, 1947)

"(6) TIME LIMITATIONS ON FILING CHARGES

"Section 10(a) of the bill amends section 10(a) of the National Labor Relations Act so as to prevent the Board from issuing any complaint on unfair labor practice charges *unless the practices occurred within six months prior to the filing and service of the charge.*

"The effect of this provision would be particularly harmful in cases where employers establish company unions or engage in surveillance, espionage, and similar misconduct. Such activities are usually carefully concealed and normally do not come to light until an outside union attempts to organize the plant. Under the present National Labor Relations Act and the Board's rules, employers are afforded adequate protection against untimely charges, for the Board will not proceed on them unless good cause appears for the delay. Moreover, even in those cases in which it proceeds, the Board usually does not require the employer to pay back wages for the period of delay. There is, therefore, no need for the proposed amendment.

"Furthermore, the provision would merely encourage employer unfair labor practices of a kind that cannot readily be detected. *By establishing within the passage of a short space of six months, an absolute immunity against such malpractices,* the bill would de-

prive employees and the public in many cases of the benefits of genuine collective bargaining and encourage resort to strikes and other means of self-help."

(Senate Minority Report No. 105, Pt. 2, on S. 1126)
(Vol. I, Page 499, Legislative History of Labor Management Relations Act, 1947)

"(5) The House Bill provided, in section 10(b), that no complaint should issue stating a charge of an unfair labor practice that occurred more than six months before the charge was filed or based on a charge that was filed more than six months before the Complaint issued. The Senate amendment also provided that no complaint should issue based upon any unfair labor practice occurring more than six months before the filing of the charge and the service of a copy of the charge upon the person against whom the charge was made, except in cases of veterans, who received special treatment.

"The provision of the House bill that required that the complaint issue within six months after the filing of the charge was designed to forestall the accumulation of back-pay claims by reason of delay in prosecuting cases. Heretofore this delay has been confined chiefly to one regional office of the Board, and the Board, itself, has had the practice in the past of mitigating such claims when it was responsible for delay. Since it is anticipated that the increased membership of the Board and other changes in the administrative provisions of the act will expedite the Board's business, the conference agreement omits the provision of the House bill respecting the time within which a complaint must issue after a charge is filed, *and retains the language of the Senate amendment that requires that charges be filed, and notice thereof be given, within six months after the acts complained of have taken place.*"

(House Conference Rept. No. 510, on H.R. 3020)
(Vol. I, Page 557, Legislative History Labor Management Relations Act, 1947)

This position of the Board would result in allowing a cause of action to be instituted not then accured upon the theory that it might accrue. The adoption by the Courts

of such contention would result in the discarding of all law applicable to causes of action on which a limitation might operate.

It would cause labor matters to be subjected to one rule and general actions under another rule of law.

> "Although a Statute of Limitations can never become operative until there is a cause of action to which it might be applied, such a statute applies generally to all causes of action within its terms, regardless of the hardship which it may work, and any action brought after the time limited for its commencement prima facia is barred."
>
> 34 Am. Juris. p. 47, Sec. 47

In the instant case, and under decisions determining the law applicable to acts of discrimination in regard to hire under Section 8(a)(3) of the Act, each act of discrimination in regard to hire may arise only when a job opening occurs, and hence each is a separate unfair labor practice subject to the limitation set forth in Section 10(b) of the Act.

It is not doubted that several, or any number of instances of discrimination in hire or rehire constituting unfair labor practices, might be joined in one "complaint", provided each has arisen and is within the six months period of limitation and is covered by the "charge" filed. It is considered, however, that no "charge" may be effective to give life to an unfair labor practice which is not born at the time the "charge" is initiated.

It is not believed that a "charge" may initiate action on an unfair labor practice which does not then exist, yet that is exactly what the Board contends, and seeks to have approved in this case.

It is not believed that any procedure may be adopted which suspends the period of limitation on matters only accruing in the future.

> "It is of the essence of a statute of limitations that time begins to run under them only after the right to

> prosecute them to a successful conclusion has fully accrued. As soon, however, as the cause of action has accrued, the Statute of Limitations begins to run thereon. . . . In the absence of a statute to the contrary, the test in each case is whether the party asserting a claim is entitled to maintain an action to enforce it, for no limitation commences to run against any demand until the obligation or demand is due and payable, in the sense that it is defined sufficiently to be capable of enforcement."
>
> (34 Am. Juris. pp. 91-3, Sec. 113)

It is conceded that a "charge" should not be a pleading in the strict sense of the word and liberal construction should be given it. It does, however, have a purpose.

The "charge" sets in motion the investigative machinery of the Board. Its service upon the employer informs him of unfair labor practices of which he is accused.

A "charge" may stay the six months period of limitation only on unfair labor practices which are contained in it and sufficiently stated to cause such unfair labor practices to be capable of identification.

The Act, the six months period of limitation contained in it, and the law generally forbid the Board from considering unfair labor practices arising subsequent to the "charge" upon which the "complaint" is issued, the jurisdiction of the Board being limited to those unfair labor practices occurring prior to the date of the "charge" filed, included in the "charge" filed, and occurring not more than six months prior to the filing of the "charge" and its service upon the person charged.

Attention is again invited to the fact that the books, records, etc., sought are not desired for the purpose of casting light on conduct alleged to constitute unfair labor practices, conviction on which is within the jurisdiction of the Board, but admittedly the records will be used for pur-

poses of conviction on alleged unfair labor practices occurring, if at all, without the six months period of limitation written in Section 10(b) of the Act.

It is to this admitted purported use to which Petitioners object.

The Persons Claimed to Have Been Discriminated Against Have No Employee Status or Preference Rights

In addition to the foregoing, the posture of this case points to the basic error of the Circuit Court of Appeals. The uncontroverted testimony in the record reflects:

1. An economic strike at the plant of Petitioner began January 13, 1950.

2. Under the doctrine of the *Mackay Radio Company* case, Petitioner sought to continue its business by offering employment to those who did not care to participate in the strike, to those who did not care to continue the strike, and to strangers who applied for employment. To each of those who were willing to accept employment, Petitioner offered them permanent employment as replacements for the strikers, after full opportunity to the strikers to return and reclaim their positions.

3. By February 21, 1950, after certain operational adjustments, and the abandonment of a night shift, all positions in the plant necessary for 100% production had been filled and the strikers who had not requested reinstatement had been permanently replaced.

4. On July 17, 1950, the Union elected to abandon the strike and notified Petitioner that it was instructing the strikers to return to their regular employment.

5. On or about July 19, 1950, 225 of the strikers appeared at the plant, requested reinstatement to their respective jobs, were advised that their jobs had been filled by perma-

nent replacements, and were permitted to make formal application for reinstatement on a form provided for that purpose. Whereupon, they left.

6. That since July 19, 1950, none of the strikers has returned and requested employment.

7. That the complaint filed herein contains no allegation that any of the strikers have applied for such vacancy at a time when there were vacancies in their respective jobs, and that any of such strikers has been refused employment because of his membership in the Union or his participation in the strike or at all.

With the foregoing facts, the recitals of the complaint and the scope of the subpoena carry the conclusion that the Board is urging the proposition, as the foundation of its complaint, that although the employer may not be required to discharge a permanent replacement in order to make a job for an economic striker, nevertheless, that striker continues to hold a sort of lien on the position which entitles him to priority of consideration for the job, when and if the replacement should subsequently vacate the job.

Union Bus Terminal of Dallas, Inc. 97 N.L.R.B. No. 49
Union Bus Terminal of Dallas, Inc. 98 N.L.R.B. No. 68

The principle that an employer may not be required to discharge or dispense with the services of a permanent replacement in favor of a returning economic striker whose job has been filled, was first announced by the Supreme Court in the case of *National Labor Relations Board* v. *Mackay Radio Corporation*, 304 U.S. 333. This decision was followed by many forms of deviations from it by the National Labor Relations Board in connection with an election following a strike. These decisions vary from those

that permit strikers to vote, to the exclusion of replacements, to rules permitting both to vote subject to challenge.

A. Sartorious & Company 10 N.L.R.B. 493
Rudolph Wurlitzer Company 32 N.L.R.B. 163
Columbia Pictures Corp. 63 N.L.R.B. 1500 (opinion at 64 N.L.R.B. 490)

The result of these decisions was often fantastic, sometimes resulting in certification of a striking union, even though it did not have a single member in the employ of the Company, nor a single vacancy into which a member could be put. (See especially *Columbia Pictures Corp.* 64 N.L.R.B. 490) The net result was the inclusion in the Taft-Hartley Act of that part of Section 9(c)(3), which reads as follows:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Obviously the foregoing provision was an effort on the part of Congress to restate the obvious intent of the *Mackay Radio Corporation* doctrine. Although it does not specifically provide that replacement wholly terminates the employee status, such an intent is reflected in the legislative history of that provision.

In the Report of the Committee on Education and Labor, submitted with H.R. 3020, which was the original House Bill, the Committee refers to some of the vague provisions in the Wagner Act and uses the following language:

> "The Board now says that an employer may replace an economic striker, one who strikes for higher pay or other changes in working conditions. The Bill writes this rule into the act, saying that a striker remains an 'employee' unless such individual has been replaced by a regular replacement; and, at the end of the subsection, it defines a replacement as being an individual who replaces a striker 'if the duration of his employ-

ment is not to be determined with reference to the existence of duration of such labor dispute'. Thus 'strike breakers' may not be regarded as 'replacements'."

The foregoing report was based upon the original Bill introduced in the House, and submitted by the Committee, and obviously contemplated that the employee status of the replaced striker had terminated with his replacement. (Legislative History of the Labor Management Relations Act, 1947, Volume I, page 303.)

The Minority Report opposing the recommendation of the Committee for the passage of the House Bill, recognized this intendment of the Committee, in the following language:

> "The provisions of section 12 read together with other sections of this bill are so drastic as to make virtually every strike illegal. Thus, even if a labor organization goes on strike because of disagreement as to the terms or conditions of employment, *the strikers cease to be employees* if, while they are engaged in such strike they are replaced, or receive unemployment compensation from any State. Since *they would thereafter no longer be 'employees'*, their strike becomes illegal. For the union that called them out would no longer represent a majority of the 'employees'; as it could no longer claim bargaining rights, its members would be striking for an illegal purpose from that moment forward." (Emphasis supplied)
>
> (Legislative History Labor Management Relations Act, 1947, Volume I, page 386.)

On April 17, 1947, Mr. Taft submitted a report from the Senate Committee on Labor and Public Welfare, containing the individual views of himself, Mr. Thomas, and Messrs. Ball, Donnell, Jenner, and Smith, in which we find the following:

> "When elections are conducted during a strike, situations frequently arise wherein the employer has con-

tinued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, *strikers permanently replaced have no right to reinstatement* (NLRB *v.* Mackay Radio, 304 U.S. 333). It appears clear that a striker having no right to replacement should not have a voice in the selection of a bargaining representative, and the committee bill so provides." (Emphasis supplied)

(Legislative History Labor Management Relations Act, 1947, Volume I, page 431.)

The Bills, as originally presented, contained provisions that the replaced striker would not have any right to vote unless the strike had been caused by an unfair labor practice. This latter provision concerning unfair labor practices, appeared to be surplusage, in view of the governing decision of the *Mackay Radio* case, and consequently, the language was cut back to that which has heretofore been quoted.

The Board has always drawn a sharp distinction between participants in a strike caused by an unfair labor practice on the part of the employer and those who participate in a purely economic strike. In the former, the Board has consistently held that unfair labor practice strikers lose none of their rights or privileges to reinstatement by virtue of the hiring of replacements, but they follow the determination in the *Mackay* case, and consistently refuse reinstatement to economic strikers who have been replaced. The Board has not, however, until the *Union Bus Terminal of Dallas* case, 98 N.L.R.B. No. 68, taken a position as to whether, in its opinion, a replaced striker retains any of the incidents of employment after his place has been taken by a newcomer.

From the foregoing, it appears obvious that the Congress intended that a replaced economic striker, by reason of such replacement was completely severed from all re-

lationships with his former employer, in the absence of circumstances which clearly create some preferential status growing out of an agreement on the part of the employer to so regard his application. No such agreement appears or is alleged in the complaint herein. *Sax vs. N.L.R.B.* (C.C.A. 7—1948) 171 F(2) 769.

Because of this, the only purpose the records sought by the Board to be produced, can have, is to show that subsequent to March 6th, 1950, and up to the present time, vacancies have occurred by death, discharge, quits or other removal of the permanent replacements in the jobs formerly held by the replaced strikers, due to normal turnover such as it experienced in any manufacturing plant, and that the employer has failed to seek out and invite the original replaced strikers to come in and take the jobs. In any event, assuming an obligation of that sort, it could not attach until July 19, 1950, when the applications for reinstatement were taken.

This question was fully dealt with by the United States Court of Appeals for the Seventh Circuit, in an opinion written by Mr. Justice Minton, then one of the Judges of the Seventh Circuit Court of Appeals, in the case of *Sax vs. National Labor Relations Board*, 171 F(2) 769, in which the Court says, after commenting on the fact that the strikers did not return and repeat their application after the one mass application had been made: (In that case, the Board had found that it was not necessary for the strikers to make application again, because the original application was a continuing one. This contention has since been rejected by the Third Circuit Court of Appeals; *N.L.R.B. vs. Pennwoven Company* 192 F(2) 521.)

> "The effect of this finding is that, whenever a vacancy occurred, the petitioner was obligated to look up the strikers and first offer them employment. • • •

We find no provision of the statute which required the petitioner to place the strikers on a preferred list. If any of the strikers had applied to the petitioner for a job after March 12 and had been turned down, and this occurred often enough to indicate a pattern of conduct by the petitioner, the Board might properly have inferred discrimination. But to say that one mass application for employment at a time when all the jobs were filled was a continuing application so as to relieve the employees of making further applications or of informing the petitioner that they desired work, is to relieve the strikers of their duty to apply when a job was available, and to shift the burden to the employer of seeking out one of the strikers to fill the job or be guilty of discrimination. *"No inference of discrimination can be drawn from the failure to employ the strikers when there was no vacancy at the time they applied. This is conceded. There had to be an application at the time of a vacancy by the fiction of continuing application. An application when there was no vacancy cannot be used to do duty when a vacancy does occur, in the absence of a clear understanding by the employer that the application was to be considered a continuing one.*

In the case of *Kansas Milling Company*, 185 F(2) 413, the Court obviously set down a cut-off date as of the date when the application for reinstatement was made, and directed the Board to determine and report to the Court what, if any, vacancies existed as of the date of the application. In this case, the Company does not wholly subscribe to the propriety of that conclusion, since that is obviously predicated on the theory that the replaced economic striker does retain some specific right to reinstatement to his job, even after it has been filled by replacements, if he can come back at some fortuitous date when the job is vacant by reason of the termination of the replacement, and on the basis of his previous employment and his

status as a striker, be entitled to successfully demand employment in that job.

Up until March, 1952, when it handed down its decision in the case of *Union Bus Terminal Company of Dallas*, 98 N.L.R.B. No. 68, no decision had been rendered by the Board, determining whether a replaced striker has a continuing right to demand reinstatement in his job, if it should subsequently become vacant by reason of the termination of the employment of the replacement. In the above case, however, the holding was to the effect that the right to the job attached if it was vacant when the application was made, even though it had previously been held by a replacement.

If the decision of the Board in the *Union Bus Terminal* case is to be taken as an accurate and binding precedent, which Petitioner does not concede, the most that can be said to be pertinent to the issues in the documents to be produced, would be records indicating what jobs either had not been permanently filled on July 19th, the date of the application for reinstatement, or had been and were vacant on that date by reason of the interim termination of employment of the replacements. In the hearing below, Petitioner tendered its records as to the state of employment on July 19th, but the tender was refused.

Before the Trial Examiner, the Petitioner has sought from the Board the names of those who, it might be claimed, had applied for reinstatement, and who have been denied reinstatement, notwithstanding an alleged vacancy in their respective jobs on July 19, 1950, when they made application, or any other date of application, if any. That information, the Board has refused to provide and the Trial Examiner has refused to require it. Under such circumstances, this effort by the Board to have produced all of the employment records of the Company at this time, notwithstanding that previously all records were made avail-

able to the Board's investigator, in order that the Board now may conduct a wholesale fishing expedition in matters that are not germane to the issues, is contrary to the purpose and intent of the statute and not contemplated by the provisions of Section 11(2) of the Act.

Conclusion

It is respectfully submitted that under the statutes, decisions and authority cited in the foregoing Brief and Argument, the judgment of the United States Circuit Court of Appeals for the Sixth Circuit should be reversed and a decree and judgment entered herein, or the cause be remanded for the entry of a judgment and decree, whereunder the "Application for Order Requiring Obedience to Subpoena Duces Tecum" filed by the National Labor Relations Board herein is denied.

It is submitted that this honorable Court should determine and adjudge that the National Labor Relations Board has no power, authority or jurisdiction to entertain, hear or determine, or convict American Snuff Company of, any unfair labor practice occasioned or arising from any alleged discrimination in hire or rehire within the meaning of Section 8 (a) (3) of the Labor Management Relations Act, 1947, and the books, records, etc., sought herein do not relate to or touch any matter properly in question before the National Labor Relations Board and the Application for Order Requiring Obedience to Subpoena Duces Tecum filed herein is denied; or, in the alternative.

That this honorable Court should determine and adjudge that the National Labor Relations Board has no power, authority or jurisdiction to entertain, hear or determine, or convict American Snuff Company of, any unfair labor practice occasioned or arising from any alleged discrimination in hire or rehire within the meaning of Section 8 (a)(3) of the Labor Management Relations Act, 1947, except and

unless the alleged unfair labor practices occurred within six months prior to the date of the filing of the Charge, to-wit: September 6, 1950, and the books, records, etc., sought herein and evidencing matters of employment and change of employment status subsequent to September 6, 1950, do not relate to or touch any matter properly in question before the National Labor Relations Board, and to that extent the Application for Order Requiring Obedience to Subpoenas Duces Tecum is denied.

(The emphasis in the foregoing is that of the writer's.)

Prayer for Writ

Your petitioners, therefore, respectfully pray that this, their Petition for the Writ of Certiorari be granted, and that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit to bring this cause and the record therein to this honorable Court to the end that this honorable Court may review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit and may consider the error assigned herein, and that upon consideration by this honorable Court the judgment of the Circuit Court of Appeals be reversed and the application for Order Requiring Obedience to Subpoena Duces Tecum filed herein by the National Labor Relations Board be denied and your Petitioners be granted full relief.

This is the first application for a Writ of Certiorari in this cause.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 409

AMERICAN SNUFF COMPANY, AND MARTIN J. CONDON, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SNUFF COMPANY, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below, incorporated in its judgment (R. 62), is reported at 196 F. 2d 1019. The oral opinion (R. 47-49) of the district court is unreported.

JURISDICTION

The judgment of the court below was entered on May 27, 1952 (R. 62). A petition for rehearing, filed by petitioners on June 12, 1952 (R. 62-68), was denied on September 5, 1952 (R. 68). The petition for a writ of certiorari was filed on October 22, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a district court may require an employer, against whom an unfair labor practice complaint has been issued, to comply with a subpena calling for the production of records at a hearing before the Board, without permitting the merits of the complaint to be litigated in the subpena enforcement proceeding in the district court.

STATUTE INVOLVED

The pertinent portions of Section 11 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 9-10.

STATEMENT

Based on a charge filed on September 6, 1950, by United Steelworkers of America, CIO (R. 68), and following an investigation of the charge (R. 36-40), a complaint was issued by the Board's General Counsel against petitioner Company on

January 16, 1952, alleging that it had violated Section 8 (a) (1) of the Act, by engaging in certain acts of interference, restraint, and coercion on and after March 6, 1950, and had violated Section 8 (a) (1) and (3) of the Act by denying employment, on or about July 17, 1950, to named employees because of their membership in the Union and participation in a strike (R. 69-75). Simultaneously with the issuance of the complaint, the Company was notified that a hearing would be held before a trial examiner of the Board commencing on March 3, 1952 (R. 76). The Company answered, admitting that it was subject to the Board's jurisdiction, but denying the other allegations of the complaint (R. 21).

On January 30, 1952, the Board issued two subpenas *duces tecum*, one directed to the Company, and the second to its president, petitioner Martin C. Condon, directing them to produce at the hearing (R. 77-79):

> All payrolls, personnel and other records of American Snuff Company showing the names, dates and job classifications of each and every hire, resignation, discharge or other termination or change of employment status of employees or applicants for employment at the American Snuff Company for each and every week commencing with the workweek immediately preceding January 13, 1950, to the present date.

On February 5, 1952, petitioners moved to quash the subpenas (R. 4). The motions were denied by the trial examiner on February 12 (R. 4-5). At the hearing on March 3, petitioners refused to comply with the subpenas (R. 5-6), and since the records requested were deemed necessary to the trial of the case, the trial examiner adjourned the hearing to permit the institution of subpena enforcement proceedings (R. 47).

An application to enforce the subpena was filed in the United States District Court for the Western District of Tennessee, Western Division, on March 3 (R. 1-8). On March 4 the Court issued a "Rule to Show Cause" (R. 24-25); petitioners answered on March 6 (R. 8-24); and a hearing was held before the Court on March 7 (R. 30-57).

In their answer to the subpena enforcement application (R. 8-24), and in supporting testimony (R. 32-45), petitioners attempted to show that the charge filed by the Union was not sufficiently particularized; that the strike involved in the proceeding before the Board had been conducted improperly; that some of the strikers had been reinstated; that other strikers had been permanently replaced or their jobs eliminated; that sufficient information had been given or proffered to the regional agents of the Board during the pre-complaint investigation; and that the material sought under the subpena related to

"alleged unfair labor practices barred by the Statute of Limitations and the Act and/or occurring subsequent to the date of the Charge filed against American Snuff Company" (R. 23).

Thereafter, the District Court held that an order should issue requiring petitioners to comply with the subpenas. The court stated that the question of enforcing the subpenas is "confided to the discretion of the Court," and that such enforcement should be ordered "where the evidence sought is not plainly incompetent or irrelevant" to the inquiry before the Board (R. 48). The court observed that (*ibid.*):

> * * * the issues specifically before the Trial Examiner are whether the [petitioners] are engaging in unfair labor practices under the law, and especially in discriminating against certain employees with respect to their employment.
>
> * * * * * *
>
> The evidence sought by the Board through its subpena the Court feels sure relates to or touches the issues in the pending controversy, and that is all that is necessary. The records in question, in the Court's opinion, will definitely throw light on the question of [petitioners'] whole policy with respect to the matters in controversy, especially on the discrimination issue. In fact, the Court can't

> see how the issues before the Trial Examiner can be developed at all without the documents and records here sought.

The court concluded that the defenses going to the merits of the complaint relate to the "principal controversy" before the Board, and that the court "has no right, and is not passing on the merits of the principal controversy one way or another. This is only a side issue, an ancillary proceeding * * *. Most of the matters * * * urged on the Court by [petitioners] are matters which should be presented to the Labor Relations Board. The scope of inquiry here is very narrow" (R. 48-49). Accordingly, on March 12, 1952, the district court issued its order requiring obedience to the subpenas (R. 26-27).

On appeal, the court below affirmed the order of the district court in a *per curiam* opinion (R. 62).

ARGUMENT

Asserting that the charge is insufficiently particularized to support the complaint, that the complaint alleges unfair labor practices barred by the six-month period of limitations, and that the strikers have been permanently replaced without discrimination, petitioners contend that the complaint issued by the Board's General Counsel is without merit. They urge that, for this reason, compliance with the subpenas should not be

ordered, and that the district court on a subpena enforcement proceeding is the appropriate forum in which to litigate the merits of their defense.

It is clear, however, that determination of the merits of an unfair labor practice complaint is confided by the Act to the Board in the proceeding before it, and that the district court in enforcing a subpena is to go no further than to determine whether the data demanded are relevant to an inquiry the Board is authorized to conduct. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507-509; *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692, 694 (C. A. 10); *National Labor Relations Board* v. *Northern Trust Co.*, 148 F. 2d 24, 27, 28 (C. A. 7), certiorari denied, 326 U. S. 731; *Bland Lumber Co.* v. *National Labor Relations Board*, 177 F. 2d 555, 557 (C. A. 5); *Hamilton* v. *National Labor Relations Board*, 177 F. 2d 676, 677 (C. A. 9); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. A. 2); *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918, 919 (C. A. 1). See also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50. The records sought by the Board's subpenas are, as the district court found, reasonably particularized and clearly relevant to the substantive issues that the Board is authorized to decide. Accordingly, whether or not the Board (or a reviewing court) should ultimately sustain the Company's defenses

to the complaint, the district court properly granted enforcement of the subpenas. Petitioners' contrary view presents no substantial question requiring review. No conflict of decisions is claimed, and none exists.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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December, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) * * * The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. * * *

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

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IN THE

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OCTOBER TERM 1952

No. 409

AMERICAN SNUFF COMPANY, and MARTIN J. CONDON, Individually and as President of the AMERICAN SNUFF COMPANY, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In reply to the recitals of the National Labor Relations Board in its brief in opposition to the petition of Petitioners herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, Petitioners respectfully represent:

The question presented herein is not as stated by Respondent:

> "Whether a district court may require an employer, against whom an unfair labor practice complaint has been issued, to comply with a subpena calling for the production of records at a hearing before the Board, without permitting the merits of the complaint to be litigated in the subpena enforcement proceeding in the district court."

The question actually is:

> Whether a district court may require an employer against whom an unfair labor practice complaint has been issued, to comply with a subpoena calling for the production of records at a hearing before the Board, when the admitted facts and proffered records before the Court, are such as to reflect the legal conclusion that the material contained in the subpoenaed records cannot and does not touch upon matters under investigation, on which the Board, as a matter of law, has power to act or to issue affirmative orders.

Petitioners do not question the right of the Board to issue and to have obeyed, subpoenas requiring the production of evidence which touches upon matters under investigation involving issues over which the Board has power to act and upon which it has power to issue affirmative orders.

In the instant case, Petitioners have made no effort "to litigate the merits of their defense", as charged by Respondent. Petitioners have sought only to bring to the attention of the Court, in the form of admitted facts and proffers of pertinent records, existing and uncontroverted facts, sufficient to advise the court as to the basic facts of the controversy involved in order that they may suggest to the court, applicable principles of law which have been ignored by the Court below, but which remove the circumstances involved herein, from the area in which the National Labor Relations Board has power to act.

The opposition brief of Respondent makes no effort to meet Petitioner's major points that the admitted facts and proffered records, which are the basis of the complaint herein, all as reflected in the record, create a proposition of law which removes the subpoenaed records beyond the pale of materiality to any of the alleged issues involved herein.

To accept the premises and recitals set forth in Respondent's brief, is to underscore the proposition that no person subpoenaed for the production of records will be heard be-

fore the Courts on an order of enforcement brought under Section 11 of the Labor Management Relations Act, 1947, to present the facts underlying the question in issue, or to defend himself against being required to produce such records on the ground that the same do not touch and are not material to the matters under investigation or in question.

Such a position would fall squarely within the observation of the late Mr. Justice Murphy that, the employment of judicial power to enforce administrative orders, while denying to the courts judicial discretion; or, while denying them access to the facts, or the right to consider defenses, may well be termed, the "Rubber Stamp theory of justice." (*Penfield* v. *Securities Exchange Commission*, 330 U. S. 585). This Court has long since ruled out such a theory in another N.L.R.B. case. (*Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49).

CONCLUSION

For the foregoing reasons together with those heretofore presented, it is respectfully submitted that there is no basis for the opposition to the petition as set forth in the brief of the National Labor Relations Board, and that the writ should issue as originally prayed.

Respectfully submitted,

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